Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

AUTOMATED SWITCHING & CONTROLS, INC. et al.,
Petitioners
v.

AMELCO INDUSTRIES, INC. et al.,
Respondents,

On Petition for a Writ of Certiorari to the
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether facts assumed as true in a motion for non-suit which show that only DBE contractors on federal programs were required to perform fraudulent acts, are sufficient create a jury question on discrimination that the program is a violation of the participants constitutional rights of due process.

2. Whether the Supreme Court guidance is unclear and has lead to the inability of the circuit court to establish minimal procedural opportunities to deny the preclusive effect of offensive collateral estoppel.

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List of Parties

Petitioners	Respondents
Automated Switching & Controls. Inc.	Amelco Industries, Inc.
Dr. Johnetta MacCalla	Reliance Insurance Company
Dr. Eric MacCalla	United Pacific Insurance Company

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The California court of appeals. Division 1 (App., *infra*. 2A-38A) issued an opinion dated January 12. 2007 and is unpublished. The opinion affirmed the judgment of the lower court. The judgment of the lower court (App., *infra*. 39A-60A), which was reviewed and is now final and is unreported. The judgment applied collateral estoppel to 8 claims. including discrimination and breach of contract. The writ of mandamus for the LACMTA substitution hearing was denied (App., *infra*. 61A-62A). An order was entered (App. Infra. 62A-64A) citing that no court has a remedy by way of mandamus to challenge a decision by an owner-agency to permit the prime to substitute subcontractors. If such a remedy existed. such relief is moot.

JURISDICTION

The court of appeals' judgment was entered on January 12. 2007. A timely petition for review to the California Supreme Court was denied on April 25, 2007. (App., *infra*, 1A). The jurisdiction of this Court is invoked under Federal Procedures 28 §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1981 and 42 U.S.C. 2000d federal statutes are involved.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

This case raises important. recurring questions relating to the unfairness of collateral estoppel and discriminatory use of federal programs for protected class to defraud the government and award prime contractors.

This writ of certeriori Appeal arises from a series of Orders and rulings by the Superior Court of Alameda County: (1) granting Respondent Amelco's motion for non-suit. conditioned on the preclusive offensive collateral estoppel effect to a prior agency administrative decision. against the Petitioners Automated Switching and Controls. Inc (ASCI) and the Drs. Eric and Johnetta MacCalla on their claim of violation of 42 U.S.C. §1981. 42 U.S.C. 2000d and 49 CFR 23 (1995) and (2) ruling from the bench a breach of contract. also conditioned on the preclusive offensive collateral estoppel effect to a prior agency administrative decision.

Petitioner Automated Switching & Controls. Inc. (hereinafter known as ASCI) entered a contractual team arrangement with Respondent Amelco Industries, Inc. (hereinafter known as Amelco) in 1994. ASCI is certified as a Disadvantaged Business Enterprise (DBE) under 49 CFR 23 (1995), now revised as *49 CFR 26.* Petitioners Dr. Eric and Johnetta MacCalla are officers of ASCI who qualify the firm as a DBE. ASCI, a small licensed engineering, computer development and technology firm specializes in electronic systems engineering. Amelco is a large licensed construction contractor.

Transit Administration's DBE goals.[1] ASCI submitted designs for the various stages of the contract. Following

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[1] 49 CFR 26.55 defines Disadvantaged Business Enterprises (DBE) as a firm that is a beneficiary in the federally funded program under

approval of equipment by the Agency for installation. Amelco directed ASCI to take over purchase orders previously negotiated and issued by Amelco with non-DBE firms. Amelco directed ASCI to submit purchase orders to the vendors on the MTA contracts and "pass through" Amelco's checks to the vendors for payment. Amelco would then claim the purchases and receive 100% credit for purchasing and fulfill its Disadvantage Business Enterprise (DBE) goal.

ASCI refused to participate in the "pass through" scheme. Amelco unilaterally removed the procurement portion from ASCI's contract and contracted with other DBEs who would perform as a front for Amelco's purchases. Shortly after the removal of procurement from ASCI's contract. Amelco terminated the contract in full.

ASCI protested termination from the project pursuant to California Public Contract Code §4107. Amelco filed a Complaint against ASCI and the MacCallas individually alleging breach of contract as one of its claims. The Petitioners filed a cross-complaint against Amelco alleging breach of contract and discrimination as one of its claims.

The MTA board conducted a fifteen minute public hearing at the regularly scheduled monthly Board meeting. five months after ASCI's contract termination. *California* Public Contracts Code §4107 requires a hearing whenever a prime contractor requests substitution of a subcontractor to assure there is no bid-shopping involved. The Petitioners were not allowed to cross-examine, subpoena witnesses or place witnesses under oath. The substitution was approved "in the best interest of MTA". Amelco assured the Agency that there would be a full litigation in court of the issues

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section 105(f) of the Surface Transportation Assistance Act of 1982 (49 CFR 23.61), whose qualifying individuals are minorities that have controlling interest in the management and daily business operations of the company.

between ASCI and Amelco and that "ASCI will be made whole".

B. PROCEDURAL HISTORY

Amelco filed the initial complaint in the Alameda Superior Court on July 7, 1995 against ASCI as well as the MacCalla on breach of contract and alter ego. ASCI and the MacCalla's filed a cross-complaint which included a discrimination cause of action under 42 U.S.C. 1981. 42 U.S.C. 2000d. 42 U.S.C. 1988.

Amelco filed a motion for summary adjudication on Petitioner's discrimination claim on June 17, 1997. The motion for summary judgment was denied, with the Court finding material issues of fact

The Respondent moved for a judgment of collateral estoppel based upon the decisions of the MTA on substitution in August 28, 1997 on the eve of trial.

On October 31, 1997 the Court issued an order pursuant to Respondents Motion for Collateral Estoppel. The Court held that the Petitioner had not exhausted its administrative remedies and further directed the Petitioners to file a writ of mandamus for the agency hearings. The order held in abeyance the determination of the collateral estoppel effect of the lower agency proceedings for the reviewing trial court to determine. Either party could return to court to continue the trial after the conclusion of the agency proceedings.

On August 26, 1998 the writ of mandamus for the MTA hearing was denied (App. 61A-62A) with an order stating that the court lacked the authority to challenge an owner-agency decision (App. 63A-62A).. The Petitioner notified the court and requested a final ruling on the collateral estoppel issue and to continue to trial.

The Court conducted a hearing on March 5, 1999. The Court stated there might be some collateral estoppel effect but that it appeared minimal. On April 14, 1999, the court issued an order stating that the effect of collateral estoppel on certain issues will remain for the trial court to resolve and subsequently retired.

The motion for collateral estoppel was heard on April 4, 2000 by Judge Carson, who ruled that collateral estoppel held but did not rule as to what extent.

The trial judge convened a 'phantom jury' to evaluate the effects of collateral estoppel. Petitioners stated in their opening statement and proffer of proof that they were members of a protected class as African American and female in the federal DBE program; the subcontract included procurement; that Amelco required them to pass through purchases that Amelco initiated and controlled by Amelco on a federally funded contract as ASCI's procurement so that Amelco could claim 100% DBE credit with the transit agency; that when ASCI refused to pass through procurement already made by Amelco, their procurement portion of the contract was removed from their contract and they were replaced with other DBEs willing to participate in the scheme. Non-DBE suppliers and subcontractors were allowed to perform on contracts under their direct control without a pass-through requirement.

Respondent made a motion for non-suit following opening statements. In a motion for non-suit, it concedes the truth of the facts proved, but denies that they, as a matter of law, sustains the plaintiff's case The Court must accept all asserted facts as true and must indulge every legitimate inference which may be drawn from those facts. (Appendix, 20A-21A). Respondent was granted a non-suit on the 23rd cause of action based on the preclusive effect of its collateral estoppel ruling on contract delay.

The trial judge ruled that the Petitioners MacCallas had no standing and could not participate in pro per on the remaining issues until the alter ego portion of the trial. The Appeals Court stated that it appears that 42 U.S.C. 2000d is inapplicable to ASCI or the MacCallas. (App. 27A).

C. DISPUTED FACTS

The California Code of Civil Procedures on motion for nonsuit (CCP 581c) sets the framework so that there are no issues of fact in question. It is comparable to failure to state a claim in federal practice.

REASONS FOR GRANTING THE PETITION

1. It is Unsettled in the Federal Circuit on the Question in a Discrimination claim as to how to apply the McDonald Douglas Test in the violations of minority contractors.

It is unsettled in the Courts on question in this discrimination claim of violation of the civil rights of minority contracts to enforce contracts as beneficiaries in federally assisted programs. In order to evaluate claims of intentional discrimination where the intent is generally impossible to prove, courts apply a burden-shifting analysis (*McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973); Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989)*) to show disparate treatment to members of protected class status.

The elements to prove a prima facie case of discrimination established in *McDonnell Douglas* are:

i. that [the plaintiff] belongs to a racial minority;

ii. that he applied and was qualified for a job for which employer was seeking applicants:

iii. that, despite his qualifications, he was rejected; and

iv. that, after rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (411 U.S. at 802)

The burden shifting analysis is used for Title VII under the Civil Rights Act of 1964 for employment discrimination cases. Courts have adapted it to Title VI discrimination claims as well. *In Lindsey v. SLT Los Angeles, LLC.* 447 F.3d 1138 (9th Cir. 2006) adapted the scheme similar to modifications by the 6th and 7th circuit Court as follows:

i. Show that the plaintiff is a member of a protected class

ii. Show that it attempted to contract for certain services

iii. It was denied the right to contract for those services;

iv. The right to contract for those services was given to others outside the protected class.

(Christian v. Wal-Mart Stores, Inc., 252 F.3d. 862, 872 (6th Cir. 2001); Bratton v. Roadway Package Sys., Inc., 77 F.3d 168, 176 (7th Cir. 1996)

The opening statement addresses the denial of their right to enforce contracts as beneficiaries of federal funds. The services in this case were procurement

within ASCI's subcontract. Instead they were only allowed to procure in a pass through scheme.

A pass-through scheme is well defined by the U.S. Department of Transportation. It is where the non-MBE is performing a substantial part of the work but using the MBE as a pass-through of purchase orders, invoices, and checks to appear that the MBE is performing the function. The intent is for the contractor to fraudulently get MBE credit for the federal program using MBEs who cooperate in the pass-through. In *United States of America v. Brothers Construction Company of Ohio, Incorporated*, 219 F.3d 300, 4th Cir. 2000, it was shown that DBE firms are decertified if and when this is discovered. Decertification leads to debarment from federal programs and DBEs are no longer able to contract with the federal government or contracts with federal assistance.

The California Courts also do not recognize the actions described in opening statement as a violation of discrimination in disparate treatment of a protected class or civil rights in the right to enforce contracts. The Appeals Court only recognizes it as fraud (App., 29A). The 9th district has expressed a high standard in granting summary judgment in discrimination cases "because the ultimate question is one that can only be resolved through a searching inquiry-one that is most appropriately conducted by a factfinder, upon the full record" (*Lindsey 447 F.3d 1138 at 1142*). Such a standard should be applied in a motion for non-suit as well, especially since summary judgment was denied previously. In 2005 the U.S. Supreme Court found that California was at odds with long standing prima facie inquiry on discrimination (*Johnson v. California, 545 U.S. 162*). The same lower court judge in that case is now the author of the Court of Appeals opinion in this

case. and again it is a question of what standards should California follow based on Supreme Court guidelines.

The Court's position is that even if all the things ASCI said that Amelco did was true. Petitioner did not show it was discriminatory (App.. 29A-30A). It let stand an award for damages that contained costs identified as discriminatory pass through (App.. 35A).

The lower court used a broad brush and issued an order and judgment that ASCI was collaterally estopped from asserting that Amelco's termination was with the intent to discriminate (App.. 46A). The Court avoided addressing the disparate treatment and material issues of fact did not go to the jury as trier of fact. The Appeal Court concluded that the opening statement showed fraud and not discrimination (Appendix. 29A).

The Appeals Court went further to say that Petitioners did not provide legal authority for their theory that circumvention of DBE programs is racial discrimination and a denial of civil rights. It is well decided that the beneficiaries under 42 U.S.C. 2000d have a private cause of action. Intentional discrimination can be proven using the McDonnell Douglas shift-burden scheme. This is typically used in Title VII cases but it is accepted practice to establish a prima facie case of intentional discrimination that it can be modified in Title VI cases other than employment. The lower court merely used the preclusive effect of offensive collateral estoppel to grant the non-suit based on contract termination. Even given that the use of offensive collateral estoppel in this case precludes ASCI from a defense for delay, the discriminatory practices noted were independent of the contract termination that collateral estoppel addressed. The elements of a prima facie case were met independent of contract termination and both the lower court and Appeals Court did not address this.

Discrimination may be proven by direct evidence or the burden-shifting scheme of *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).* The decision to allow the users of DBE programs to require DBEs to serve as a pass-throughs for prime contract credits on federal goals insures the opposite effect from protection of a protected class from discriminatory practices. Instead this action serves to encourage and promote abuses knowing that avenues to the Courts are closed.

2. The US Supreme Court is Unsettled On What Are Alternative Procedural Opportunities That Make The Use of Offensive Collateral Estoppel Unfair.

In this case, the lower court applied a broad brush and applied offensive collateral estoppel to anything dealing with delay. As a result, the lower court ruled that based on collateral estoppel on delay, ASCI could not obtain a ruling in its favor on discrimination.

Petitioner's argued that the MTA proceedings did not posses a judicial character because there was no impartial decision maker, no sworn testimony, no opportunity to subpoena or cross examine, and no written statement of the reasons for the decision. The Court of Appeals acknowledged that the MTA proceedings did not have such indicia (App., 20A-21A) but declared that this is not preclusive and the collateral estoppel ruling was allowed to stand. In evaluating fairness of offensive collateral estoppel, the Appeals Court went so far as to say, "the offensive-defensive distinction is an anachronism no longer deserving of judicial recognition. (App., 24A). The Court did not address the caution of the US Supreme Court on unfairness and the

consideration of availability of alternative procedural opportunities that could provide a different result.

The courts were the selected forum to adjudicate the contract issues of breach of contract and delay. An informal hearing on subcontractor substitution was held months later where Amelco was allowed to substitute with the understanding that the courts would resolve the differences between the ASCI and Amelco. Courts have no minimal definition of what constitutes a fair adversary proceedings. The Appeals court noted that the LACMTA admittedly lacked elements of an adversarial hearing including disinterested party as hearing officer. discovery. submitted evidence to the hearing officers. and cross-examination available in the pending lawsuit.(App. 20A-21A))

The U.S. Supreme Court in *Parklane (439 U.S. 322)* recognized a greater possibility for unfairness from the use of offensive collateral estoppel and granted the court "broad discretion to determine when it should be applied". But this discretion should not be exercised to permit the use of offensive collateral estoppel "where ... the application of offensive estoppel would be unfair to defendant. The court should consider several non-exclusive factors including whether procedural opportunities are available in the pending action that were not available in the prior action. (see id at 331-32). The District Circuit cautions that "The doctrine [of offensive collateral estoppel] is detailed, difficult, and potentially dangerous. (*Jack Faucett Assocs. V. AT&T, 744 F 2d 118, 124 (D.C. Cir. 1984)*)

The lower court used a broad brush that any defense dealing with delay was collaterally estopp[illegible]. This broad brush included any argument that was supportive and the Federal Courts have stated that "such a broad application of offensive collateral estoppel risks the very unfairness about which the Supreme Court was

concerned in *Parklane*, 439 U.S. at 330-31. (*Kloth v. Microsoft Corp.* 444. F. 3d (4th Cir. 2006) at 312.

There is a misperception on the US Supreme Court guidelines on weighing unfairness when there are alternative procedural opportunities. The Supreme Court in Parklane was silent on what it considered minimal procedural opportunities. In this case there was an availability of procedural opportunities including discovery not available in the substitution hearing that could result in a different result. Federal courts have interpreted availability of discovery as an example of a procedural opportunity where it is unfair to use offensive collateral estoppel. The application of such consideration is absent in this case.

Through depositions and documents obtained in discovery ASCI obtained evidence or ex parte meetings of MTA Board decision makers with lobbyists. intimidation by Amelco of MTA staff witnesses if Amelco did not get substitution approved. approvals of ASCI designs not presented to the Board. contract schedule information that contradicted the presentation of Amelco's lawyer. and credits Amelco negotiated for MTA change orders to ASCI's approved design. The staff member. who answered questions on staff recommendation to the Board on substitution, stated in deposition that he felt that without approval of substitution, that there was no back-up plan. If ASCI had the opportunity to present its defense for delay and breach of contract, the result could have been different.

3. The California Courts Conflict with the US Supreme Court on Standing for a Claim under 42 U.S.C. 2000d.

The California Supreme Court has decided two

important federal matters that conflict with the United States Supreme Court. The claim is under Title VI It is well settled that there is an implied private right to action to enforce §601's core prohibition of discrimination in federally financed programs. *(Guardian Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610-611 (1983)*. It is equally clear that §601 prohibits intentional discrimination (*Alexander v. Sandoval, 532 U.S. 275, 284 (2001)*. Similarly, it is equally clear that a Congress that intends the statute to be enforced through private claims intends the authoritative interpretation of the statute to be enforced as well (*Sandoval, 532 U.S.* at *284*).

The California Courts do not recognize the standing of the Petitioners under *42 U.S. 2000d*. This is in conflict with the Federal courts. The Courts have found that a corporation is created "as a legal entity with its own interest to represent, as well as the interests of its shareholders." [*Daniel J. Rosales and National Business Communications, Inc. v. AT&T Information Systems, Inc. (1988) 702 F. Sup. 1489, 1496*]. Where the corporation gets its minority status from its individual stockholders, the Court went on to state that:

> "...either the corporate or the individuals if not both, can assert a claim ... under Section 1981. This court is unaware of any authority suggesting that a person who lawfully invokes the incorporation laws thereby forfeits his rights under Section 1981." *(Id. at 1497)*.

The lower court ruled that the MacCallas lacked standing to bring a claim under 42 U.S.C. 1981 or 42 U.S.C. 2000d.

The federally assisted program under the Department of Transportation formulated regulations in 49 CFR Part 23 (1995) address the DBE program. Part 23.7

expressly prohibits discrimination based on race, color, national origin, or sex.

The MBE program consists of minorities and women who are certified under 42 CFR 23.53. Agencies set contract goals for MBE participation and contractors may count towards its MBE goals only expenditures to MBEs that perform a commercially useful function. This requires that the MBE must be responsible for execution of a distinct element of a contract and must carry out its responsibilities by actually performing, managing, and supervising the work involved.

.4. Decisions From this Review on Discrimination in DBE Programs Affect Participants in the National Program

Until 1989, the MBE and DBE programs remained uncontroversial. With the Supreme Court ruling in Croson v. City of Richmond, the programs came to the forefront. Congress has identified a need for such programs. Much attention is now placed on the program to address discrimination and the need for the program to be narrowly tailored *(Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989))*.

The use of pass-through schemes keeps real contract opportunities away from DBE contractors and inflates statistics of participation giving a false impression that injustice is being resolved. The OIG in its report to Congress states that DBE fraud through use of fronts affects the integrity of the program.

Given that the programs are narrowly tailored as required by Supreme Court decisions, the integrity of the programs are seriously hampered if it becomes mired in hampering DBE integration into US society from the use

of fronts for non-DBE contractors. The federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetrates the effects of either public or private discrimination in the transportation industry *(Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989))*

The California Courts decision to rule that it does not see discrimination in the practice of prime contractors requiring DBEs to be fronts while non-DBE's are allowed to perform normal contracting practices undermines the integrity of the program and creates additional animus to the program by the American public who see non-minority companies benefiting from the program at the expense of minority companies. In *Adarand Constructors, Inc. v. Pena, 228 F.3d 1147 (10th Cir.2000)*, the Court states "It is beyond dispute that any public entity, state, or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evils of private prejudice"

The DBE program goes through constant changes to close the loopholes of fronts in the DBE program. DBE contractors need to know and feel comfortable that they can enter into contracts to perform and enforce contracts just like non-DBE contractors.

In the July 8, 2003 DOT/OIG testimony supplement to the House Budget Committee, the subject of DBE fraud in projects remained a serious concern. Testimony and dialogue was recorded which showed an expressed concern for serious enforcement and a recognition that compliance required more attention. Problems appeared nationwide with 30 ongoing investigations in 16 states. The testimony went to state:

> "This type of fraud typically involves prime contractors who conspire with "false fronts" DBE

> firms to fraudulently meet DBE participation criteria in order to obtain contracts. In such case, DBEs either do not perform the work or yield total control of personnel and operations to the prime contractors. This crime defrauds the integrity of the DBE programs and harms legitimate DBEs who abide by the law"

Still in 2007, the FTA states in its triennial review that recent investigation by the U.S.DOT Office of the Inspector General raised concerns about the administration of DBE programs. Specifically, it found the DBE certified firms were serving as "fronts" for ineligible firms"

The DBE Program Administration Manual and the regulations on the DBE program are periodically updated to address this ever present problem. The Courts are needed as an avenue to protect civil rights and the rulings of the California Courts sends the wrong message to primes that DBEs can't enforce refusal to participate in discriminatory practices without the consequences of losing or being in breach of contract.

5. Discriminatory Practices Affect Administration of Government Programs

The federal government is commissioned with enforcing the program. The Office of Inspector General in its report to Congress stated that the use of DBE fronts is hurting the integrity of the program. The Courts are needed to help alleviate the problem of not allowing DBEs to enter and enforce contracts like non-DBEs.

We ask the Court to grant certeriori to provide a clear direction on these issues of national importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted. July 24. 2007

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